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EXAMINER
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WOOD, ELIZABETH D

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PAPER

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* LAWRENCE J. TERZO

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Appeal 2008-4189  
Application 10/774,302  
Technology Center 1700

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Decided: October 31, 2008

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Before TERRY J. OWENS, JEFFREY T. SMITH, and  
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

COLAIANNI, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134 the final rejection of claims 1, 3, 4, and 7-20. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

We AFFIRM.

INTRODUCTION

Appellant claims a method of accelerating the setting time of concrete at low temperatures. Appellant also claims an admixture effective in concrete at temperatures less than 60° F comprising a non-chloride type

accelerator and a nitrite-based corrosion inhibitor. Claims 1 and 10 are illustrative:

1. A method of accelerating setting time of concrete at low temperatures, the method comprising:

(a) preparing a concrete mixture effective at an ambient temperature of less than 60° F and more than 0° F;

(b) adding an admixture to a cement either separately or jointly, to produce a concrete mix with an accelerated setting time compared to a concrete without the admixture, wherein said admixture comprises a non-chloride type accelerator and a nitrite-based corrosion inhibitor.

10. An admixture effective in concrete at temperatures of less than 60° F and greater than 0° F, the admixture comprising a non-chloride type accelerator and a nitrite-based corrosion inhibitor.

The Examiner relies on the following prior art reference as evidence of unpatentability:

Anderson

US 2003/0127026 A1

Jul. 10, 2003

Appellant appeals the following rejections:

1. Claims 1, 3, 4, and 7-20 are rejected under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
2. Claims 1, 3, 4, and 7-20 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Anderson.

Appellant separately argues claims 1 and 10. Accordingly, we address Appellant's arguments with respect to rejections 1 and 2 with regard to claims 1 and 10.<sup>1</sup>

## OPINION

### 35 U.S.C. § 112, SECOND PARAGRAPH, REJECTION

The Examiner rejects all the appealed claims as being indefinite because the meaning of the claim 1 phrase “a concrete mixture effective at an ambient temperature of” is unclear (Ans. 2-3).<sup>2</sup>

Appellant argues that “effective” as used in the claims means that the setting time of the concrete is reduced at low temperatures (App. Br. 4). We agree.

The issue presented is whether Appellant has shown that the Examiner erred in concluding that the claim term “effective” in claims 1-20 fails to particularly point out and distinctly claim the subject matter which Appellant regards as the invention? We answer this question in the affirmative.

The test for definiteness under 35 U.S.C. 112, second paragraph, is whether “those skilled in the art would understand what is claimed when the

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<sup>1</sup> Appellant attaches a copy of a 132 Declaration by Lawrence J. Terzo (hereinafter the “Terzo Declaration”) filed May 10, 2005. The Terzo Declaration addresses a 35 U.S.C. § 112, first paragraph, rejection for lack of enablement in the Non-Final Office Action mailed December 15, 2004, which was withdrawn by the Examiner. The content of the Terzo Declaration is not applicable to the pending 35 U.S.C. § 112, second paragraph, rejection or the 35 U.S.C. § 103 rejection. Accordingly, the Terzo Declaration is not relevant to the pending rejections.

<sup>2</sup> Independent claim 10 recites a similar phrase “An admixture effective in concrete”, on which, presumably, the Examiner's 35 U.S.C. § 112, second paragraph, rejection of claim 10 is based.

claim is read in light of the specification.” *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986).

The Specification describes that the claimed admixture of a non-chloride accelerator and a nitrite-based corrosion inhibitor reduces the setting time of concrete at an ambient temperature of about 60° F or less, down to about 0° F whether or not the concrete mixture contains fly ash (Spec. ¶¶ [0008], [0011], and [0017] to [0023]). Thus, a person of ordinary skill in the art would have understood what the claim term “effective” means (i.e., achieving a reduced setting time of the concrete at an ambient temperature of less than 60° F and more than 0° F) when the claims are read in light of the Specification.

We cannot sustain the Examiner’s § 112, second paragraph, rejection of claims 1, 3, 4, and 7-20.

### 35 U.S.C. § 103 REJECTION OVER ANDERSON

Appellant argues that Anderson does not teach combining a non-chloride type accelerator and a nitrite-based corrosion inhibitor to reduce concrete set time at low temperature (App. Br. 4). Appellant contends that Anderson does not disclose that the nitrite based corrosion inhibitor, alone or in combination with other additives, has properties other than retarding corrosion of reinforcing steel (App. Br. 5).

The Examiner finds that Anderson discloses accelerators for concrete “include non-chloride type accelerators and/or calcium nitrate [*sic* calcium nitrite]” (Ans. 3). The Examiner finds that the only difference between the instant claims and the reference disclosure is the intended use language “for use in concrete at temperatures of” and “accelerating the set time” (Ans. 4).

The Examiner concludes that the claimed invention would have been obvious because the “for use” feature is simply an intended use that does not confer patentability on the claims, and because Anderson’s composition contains the same materials as claimed, the two compositions would inherently have the same properties (Ans. 4).

The issue presented is: whether Appellant has shown that the Examiner erred in concluding that the claimed invention would have been obvious over Anderson? We answer that question in the negative.

Anderson discloses a high early-strength cementitious composition containing a combination admixture system which comprises a polycarboxylate high range water reducing dispersant, an accelerator, and a retarder (Anderson ¶ [0010]). Anderson further discloses that the accelerator may include a “nonchloride type accelerator and/or RHEOCRETE® CNI calcium nitrite-based corrosion inhibitor” (Anderson ¶ [0142]). The cementitious composition may include corrosion inhibitors and fly ash, among other additives (Anderson ¶¶ [0159] to [0162]). Anderson discloses an embodiment where the cementitious compositions may set between 50 to 100 degrees Fahrenheit (Anderson ¶ [0175]).

Based on the above disclosures, we agree with the Examiner that the claimed invention would have been obvious in view of Anderson. Specifically, Anderson discloses a cementitious composition that may include an accelerator comprised of a nonchloride type accelerator and a calcium nitrite corrosion inhibitor; the same composition claimed by Appellant. Accordingly, because Anderson’s composition and method

appear to be identical to Appellant's claimed composition and method<sup>3</sup>, the burden was properly shifted to Appellant to show that Anderson's composition and method of using the composition do not inherently possess the claimed characteristics (i.e., a reduced setting time at lower temperatures). *In re Best*, 562 F.2d 1252, 1255 (CCPA 1977).

However, Appellant has not provided any persuasive evidence or argument that Anderson's cementitious composition does not possess the reduced setting time at lower temperatures. Appellant's only argument is that the Examiner has not established that Anderson's concrete inherently sets more rapidly at low temperatures (Reply Br. 2-3). Appellant's argument misses the point. The Examiner has established that the claimed composition and Anderson's composition appear to be identical. Accordingly, in view of the court's holding in *Best* cited *supra*, the burden was properly shifted to Appellant to show that Anderson's admixture and method of using the admixture to accelerate the setting time for a cementitious composition would not result in a reduced setting time at lower temperatures. *Best*, 562 F.2d at 1255. Appellant has not satisfied that burden.

In fact, Anderson discloses a cementitious composition that sets at temperatures as low as 50°F (Anderson ¶ [0175]), which falls within and overlaps with Appellant's claimed range of "less than 60° F and more than 0° F" (claims 1 and 10) further supporting the Examiner's inherency finding.

In view of the foregoing, we sustain the Examiner's § 103 rejection of claims 1, 3, 4, and 7-20 over Anderson.

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<sup>3</sup> Appellant's claims 1 and 10 use the open-ended transitional claim language "comprising", which does not exclude other materials that may be present in Anderson's composition. *In re Crish*, 393 F.3d 1253, 1257 (Fed. Cir. 2004).

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Application 10/774,302

DECISION

The Examiner's decision is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

PL Initial:  
sld

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